

David K. Byers, Administrative Director
Administrative Office of the Courts
1501 W. Washington St.
Phoenix, AZ 85007

IN THE SUPREME COURT

STATE OF ARIZONA

PETITION TO AMEND RULE 17.1(f)(1))	No. R-20-
AND RULE 41, FORM 28, ARIZONA)	
RULES OF CRIMINAL PROCEDURE)	
)	
_____)	

Pursuant to Rule 28, Rules of the Supreme Court, Petitioner requests the Court to amend Rule 17.1(f)(1) of the Arizona Rules of Criminal Procedure, a rule that allows telephonic pleas in limited jurisdiction courts, and Rule 41, Form 28, a form used for the entry of telephonic pleas of guilty and no contest. The proposed amendments are shown in the Appendix.

(1)Need for the Proposed Amendments. The proposed amendments are needed for three reasons.

First, although Rule 17.1(f)(1) expressly allows a limited jurisdiction court to accept a telephonic plea, there is nothing in the rule that confers authority to telephonically sentence a defendant. Some stakeholders have contended that a

defendant who enters a telephonic plea must appear personally in court for sentencing. Although most courts don't take that position, an amendment to the rule will remove any ambiguity about the court's authority to telephonically sentence a defendant who enters a telephonic plea.

Second, A.R.S. § 13-607(A) requires the court, "at the time of sentencing" for a conviction of misdemeanor theft (A.R.S. § 13-1802), shoplifting (A.R.S. § 13-1805), a domestic violence offense (as defined in A.R.S. § 13-3601), or certain traffic offenses (A.R.S. § 28-1301, et seq.) to "either permanently affix a defendant's fingerprint to the document or order [i.e., the judgment of guilt and sentence] or order or obtain and record the defendant's two fingerprint biometric-based identifier in the court case file." The recording of a fingerprint biometric-based identifier is not feasible for a telephonic plea, so the fingerprint in these cases needs to be affixed to the judgment of conviction.

Criminal Rule 41, Form 28, is used for a telephonic guilty plea or no contest plea proceeding. Among other things, the form requires the defendant's acknowledgment of various rights, followed by the defendant's signature and a certification by a law enforcement officer that the defendant personally appeared before the officer and affixed a right index fingerprint to the document. The court therefore has the defendant's fingerprint on file. Unfortunately, it does not have it on file for the correct document, because Form 28 does not purport to be a judgment

or a sentencing document. Reorganizing the form as explained below and as shown in the Appendix should cure this deficiency.

Third, Form 28 needs restyling. For example, the form begins with this sentence: “Defendant appears personally and expresses a desire to plead guilty or no context to the charges indicated and I find the following facts....” In that sentence, “I” refers to the judicial officer. But the following sentences at the end of the same page say, “I certify that I have read and that I understand all of the matters cited above. I wish to give up my constitutional rights....” Here, “I” refers to the defendant. The pronoun “I” should not be used on the same page and in these contexts to refer to two different individuals.

Furthermore, Rule 17.1(f)(1)(A) allows a defendant to appear telephonically if (a) the defendant resides out-of-state or more than 100 miles from the courthouse where the case was filed; or (b) the defendant has a serious medical condition so that a personal appearance would be an undue hardship, regardless of the distance to court. Form 28 currently includes an affidavit of residency if the first basis is used as the grounds for a telephonic appearance, but the form does not require any information from the defendant for the second basis. The proposed form in the Appendix addresses this. The revised form also makes minor substantive revisions, but more importantly, it makes significant organizational changes that enhance the form’s clarity and readability.

(2) Discussion of the Proposed Amendments.

Rule 17.1(f)(1) (“telephonic pleas”) currently has three subparts: (A) Eligibility; (B) Procedure; and (C) Judicial Findings. Petitioner proposes to add a fourth subpart entitled “(D) Sentencing.” This new subpart would provide, “Following entry and acceptance of a telephonic plea, the court may proceed to telephonically sentence the defendant on the same day or subsequently.” This would clarify the court’s authority to sentence the defendant telephonically.

The proposed rule adds other provisions suggested by stakeholder comments to a previous draft, including the following:

- (a) Section (f) clarifies that sentencing a defendant by telephone meets the requirements of Rule 26.9, which requires the defendant to be present at sentencing.
- (b) Subpart (f)(1)(B) (“procedure”) allows the defendant to submit the requisite documents through an Online Dispute Resolution system (“O.D.R.”), if authorized by the court. Some Arizona courts have begun using O.D.R. on a pilot basis for minor offenses, and in the future, they might expand the use of O.D.R. to certain misdemeanors.
- (c) A new subpart (f)(1)(B)(iii) would allow the prosecutor to provide the defendant any other forms deemed necessary for completing a plea under the circumstances of the case. These forms might include, for example, a

jail facility certification if the sentence provides for incarceration in an out-of-state facility, credit card information for payment of a fine, or a specific waiver of the right to counsel.

(d) A new subpart (f)(1)(E) would provide that the victim has the same rights to notice and participation in a telephonic plea proceeding as the victim would have in a non-telephonic proceeding.

Petitioner also proposes to modify Form 28 so that it includes, in a single document, the court's judgment of guilt and sentence. See further Rule 41, Form 28(a), which is used for pleas by mail in limited jurisdiction courts and that includes, after the defendant's signed waiver of rights, the court's acceptance of the plea and a judgment of conviction. Because the defendant's fingerprint would be contained on a comprehensive document that includes the court's judgment, revised Form 28 would comply with the statutory requirement. The current form's "Affidavit of Residency," which requires a notary, has been eliminated. The proposed form instead requires an unnotarized declaration under penalty of perjury; a law enforcement officer must still verify the defendant's identity on the modified form.

Petitioner has revised the language and signature lines on Form 28 to distinguish the individuals to whom the pronoun "I" refers. The form would also be modified to provide a checkbox for a defendant who wishes to appear telephonically due to a serious medical condition. To preserve medical confidentiality, the form

would not require the defendant to specify the serious medical condition, but the form would advise the defendant that the court may require separate documentation of that condition to support a telephonic appearance.

Because of the extent of the proposed revisions to Form 28, Petitioner suggests that the Court abrogate the current form, and replace it with the new version, which is shown without markup in the Appendix.

(3) Conclusion. For the reasons above, Petitioner requests the Court to amend Rule 17.1(f)(1) and Rule 41, Form 28, as shown in the Appendix.

RESPECTFULLY SUBMITTED this 8th day of January 2020.

By: _____
David K. Byers, Administrative Director
Administrative Office of the Courts

Appendix

Proposed Amendments to Rule 17.1(f)(1) and to Rule 41, Form 28(a)

Additional text is shown by underline. Deleted text is shown by ~~striketrough~~.

Rule 17.1. The Defendant's Plea.

(a) Jurisdiction; Personal Appearance.

- (1) ***Jurisdiction.*** Only a court having jurisdiction to try the offense may accept a plea of guilty or no contest.
- (2) ***Personal Appearance.*** Except as provided in these rules, a court may accept a plea only if the defendant makes it personally in open court. If the defendant is a corporation, defense counsel or a corporate officer may enter a plea for the corporation. For purposes of this rule, a defendant who makes an appearance under Rule 1.5 is deemed to personally appear.

(b) Voluntary and Intelligent Plea. A court may accept a plea of guilty or no contest only if the defendant enters the plea voluntarily and intelligently. Courts must use the procedures in Rules 17.2, 17.3, and 17.4 to assure compliance with this rule.

(c) No Contest Plea. A plea of no contest may be accepted only after the court gives due consideration to the parties' views and to the interest of the public in the effective administration of justice.

(d) Record of a Plea. The court must make a complete record of all plea proceedings.

(e) Waiver of Appeal. A defendant who pleads guilty or no contest in a noncapital case waives the right to file a notice of appeal and to have an appellate court review the proceedings on a direct appeal under Rule 31. A defendant who pleads guilty or no contest may seek relief under Rule 33 by filing a Notice Requesting Post-Conviction Relief and a Petition for Post-Conviction Relief in the trial court.

(f) Limited Jurisdiction Court Alternatives for Entering a Plea. The provisions of Rule 26.9, which require a defendant to be present at the time of sentencing, are met by the requirements of this section.

(1) Telephonic Pleas.

- (A) Eligibility.** A limited jurisdiction court has discretion to accept a telephonic plea of guilty or no contest to an offense if the defendant provides written certification and the court finds the defendant:

- (i) resides out-of-state or more than 100 miles from the court in which the plea is taken; or
 - (ii) has a serious medical condition so that appearing in person would be an undue hardship, regardless of distance to the court.
- (B) *Procedure.*** The defendant must submit the plea in writing substantially in the form set forth in Rule 41, Form 28. If authorized by the court, the defendant may submit telephonic plea documents through an online dispute resolution system. The documents the defendant submits for a telephonic plea must include the following:
- (i) a statement by the defendant that the defendant has read and understands the information in the form, waives applicable constitutional rights for a plea, and enters a plea of guilty or no contest to each of the offenses in the complaint; ~~and~~
 - (ii) a signed certification from a peace officer in the state in which the defendant resides--or, if the defendant is an Arizona resident, a peace officer in the county in which the defendant resides--that the defendant personally appeared before the officer and signed ~~the certification described in (f)(1)(B)(i)~~ Form 28, and the officer ~~affixes~~ affixed the defendant's fingerprint to the form; and
 - (iii) any other forms provided by the prosecutor that are deemed necessary for completing a plea under the circumstances of the case.
- (C) *Judicial Findings.*** Before accepting a plea, the court must hold a telephonic hearing with the parties, inform the defendant that the offense may be used as a prior conviction, and find:
- (i) it has personally advised the defendant of the items set forth in the form;
 - (ii) a factual basis exists for believing the defendant is guilty of the charged offenses; and
 - (iii) the defendant's plea is knowingly, voluntarily, and intelligently entered.
- (D) *Sentencing.*** After entry and acceptance of a telephonic plea, and notwithstanding Rule 26.9 and A.R.S. § 13-607, the court may proceed to telephonically sentence the defendant, either on the same day or subsequently.
- (E) *Victim's Rights.*** In a telephonic plea proceeding, a victim has the same rights under Rule 39 to notice and participation as if the defendant physically appeared in the courtroom.

(2) *Plea by Mail.*

- (A) *Eligibility.*** A limited jurisdiction court has discretion to accept by mail a written plea of guilty or no contest to a misdemeanor or petty offense if the court finds that a personal appearance by the defendant would constitute an undue hardship such as illness, physical incapacity, substantial travel distance, or incarceration. The presiding judge of each court must establish a policy for the State's participation in pleas submitted by mail.
- (B) *When a Plea May Not Be Accepted by Mail.*** A court may not accept a plea by mail in a case:
- (i)** involving a victim;
 - (ii)** in which the court may impose a jail term, unless the defendant is sentenced to time served or the defendant is currently incarcerated and the proposed term of incarceration would be served concurrently and not extend the period of incarceration;
 - (iii)** in which the court may sentence the defendant to a term of probation;
 - (iv)** involving an offense for which A.R.S. § 13-607 requires the taking of a fingerprint upon sentencing; or
 - (v)** in which this method of entering a plea would not be in the interests of justice.
- (C) *Procedure.*** The defendant must submit the plea in writing substantially in the form set forth in Rule 41, Form 28(a). The defendant must sign the plea form, which must include the following:
- (i)** a statement that the defendant has read and understands the information on the form, waives applicable constitutional rights for a plea, and enters a plea of guilty or no contest to each of the offenses in the complaint and consents to the entry of judgment; and
 - (ii)** a statement for the court to consider when determining the sentence.
- (D) *Mailing.*** The court must mail a copy of the judgment to the defendant.

FORM 28: CLEAN VERSION AS PROPOSED

_____ COURT

_____ County, Arizona

STATE OF ARIZONA Plaintiff
-VS-

[CASE/COMPLAINT NO.]

**TELEPHONIC
GUILTY/NO CONTEST
PLEA PROCEEDING;
JUDGMENT OF GUILT
AND CONVICTION**

Defendant (FIRST, MI, LAST)

Defendant states:

1. ☐ I have an attorney or ☐ I do not have an attorney but I waive my right to an attorney.
2. I have a copy of the criminal complaint in this case. I have read and understand the charges filed against me. I hereby agree to plead ☐ guilty or ☐ no contest
3. I understand the nature of the charges as indicated:
☐ Driving or in actual physical control of a motor vehicle while under the influence of intoxicating liquor/toxic vapor/drugs.
☐ Driving or in actual physical control of a motor vehicle with an alcohol concentration of .08 percent or more within 2 hours of driving or being in actual physical control.
☐ Driving or in actual physical control of a motor vehicle with an alcohol concentration of .15 percent or more within 2 hours of driving or being in actual physical control.
☐ Driving or in actual physical control of a motor vehicle with any illegal drug or its metabolite in the defendant's body.
☐ Driving or in actual physical control of a commercial vehicle with an alcohol concentration of .04 percent or more.
☐ Other: _____
4. ☐ I am pleading guilty or no contest to all the charges in the complaint, or
☐ I have entered into a written plea agreement and I agree to its terms.
5. I admit that if my case went to trial, the facts would support the charges against me.
6. I understand the range of penalties to be:
☐ Class 1 misdemeanor: a \$2500 fine, 6 months jail, and/or 3 years' probation, plus surcharges and fees.
☐ Class 1 misdemeanor: a \$2500 fine, 6 months jail, and/or 5 years' probation, plus surcharges and fees.
☐ Class 2 misdemeanor: a \$750 fine, 4 months jail, and/or 2 years' probation, plus surcharges and fees.
☐ Class 3 misdemeanor: a \$500 fine, 30 days jail, and/or 1 year probation, plus surcharges and fees.
☐ Other: _____
7. I understand that by pleading guilty or no contest, I am giving up the following constitutional rights:
 - a. The right to plead not guilty and require the State to prove guilt beyond a reasonable doubt.
 - b. The right to a trial ☐ by jury ☐ by a judge.
 - c. The right to assistance of an attorney at all stages of the proceeding, including appeal. In some cases, I understand that I might be eligible for a court-appointed attorney at a reduced cost or at no cost if I cannot afford one.
 - d. The right to confront the witnesses against me and to cross-examine them as to the truthfulness of their testimony.
 - e. The right to present evidence in my own behalf and to have the court compel my chosen witnesses to appear and testify free of charge.
 - f. The right to remain silent, not to incriminate myself, and to be presumed innocent unless/or until proven guilty beyond a reasonable doubt.

g. The right to a direct appeal.

8. My plea is voluntary and not the result of force or threats. No promises were made to me concerning the consequences of my plea or what my sentence will be, other than those contained in a plea agreement if I have one.
9. I understand that if I am arrested on a subsequent offense, I may be charged with a more serious offense and associated penalties.
10. I understand that my guilty or no contest plea in this case may result in a violation of probation or parole in another case.
11. I understand that if I am not a citizen of the United States, pleading guilty or no contest to a crime may affect my immigration status. Admitting guilt may result in deportation even if the charge is later dismissed. I understand that my plea or admission of guilt or no contest could result in my deportation or removal, could prevent me from even being able to get legal status in the United States, or could prevent me from becoming a United States citizen.
12. I understand that by pleading guilty or no contest, I waive the right to file a notice of appeal and to have an appellate court review the proceedings on a direct appeal under Rule 31, and that I may only seek relief under Rule 33 by filing a Notice Requesting Post-Conviction Relief and a Petition for Post-Conviction Relief in the trial court.
13. I am requesting to enter my plea, and that I be sentenced, telephonically because:

- ☐ I am not a resident of the State of Arizona because I am a resident of _____ County _____ in the State of _____,
- ☐ I reside in the city or town of _____ in _____ County, Arizona, which is more than 100 miles from the court where this case was filed, or
- ☐ regardless of the distance from the court, I have a serious medical condition so that appearing in person would be an undue hardship for me. (The court may require separate documentation of that condition to support a telephonic appearance.)

I DECLARE under penalty of perjury that the above information concerning my residency or medical condition is true and correct.

I CERTIFY that I have read and that I understand all the above matters. I wish to give up my constitutional rights, including my right to a trial by jury and my right to an attorney, and to plead guilty or no contest to the charge(s) of:

Defendant's signature:

Dated: _____

Defendant's Address: _____

Defendant's Telephone Number: _____

[If the defendant has an attorney]: I have explained to the defendant the nature of the charge and the defendant's constitutional rights, and I concur with the defendant's plea.

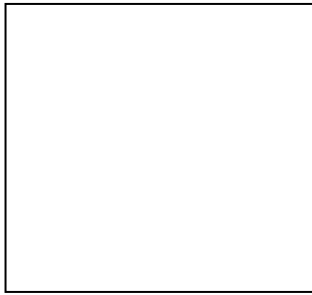
Signature of defendant's attorney (if any), State Bar number, and date: _____

OFFICER'S CERTIFICATION

I CERTIFY that

1. the above-named defendant personally appeared before me,
2. the defendant acknowledged that he or she read all the foregoing information,
3. the defendant identified himself or herself to me by a driver's license or a picture ID from the State of _____, number _____

4. I have affixed a print of the defendant's right index finger to this document in the box below.



Fingerprint

Dated: _____

Officer Name and Badge Number

Law Enforcement Agency

Address

(_____) _____
Telephone

(The following section is for court use only.)

ACCEPTANCE OF PLEA AND JUDGMENT OF CONVICTION

The defendant has appeared telephonically before the court on the date indicated below [] with or [] without an attorney. If defendant required an interpreter, the interpreter's name is: _____.

The court has advised the defendant and confirmed the defendant's understanding of the following:

1. The nature of the charges to which defendant is pleading guilty or no contest, and the range of possible penalties;
2. The constitutional rights that defendant is waiving by pleading guilty or no contest, and that the defendant's waiver is knowing and voluntary;
3. The right to file a petition for post-conviction relief and, if denied, a petition for review.

I have asked the defendant about any status on probation or parole, I have given the defendant an immigration advisement, and I have spoken with the defendant regarding the other matters set forth above the defendant's signature. The court finds a factual basis for the plea and that the defendant has entered the plea knowingly and voluntarily and without threats or promises, other than those contained in a plea agreement, if any. The court accordingly accepts the defendant's plea. It is the judgment of the court that the defendant is guilty of the following offenses: _____

The defendant is sentenced as follows: _____

Judge's signature: _____ Date: _____

I certify that a copy of this document was mailed to the defendant at the address shown above on this date: _____ by (clerk's name or initials): _____.